

## QUARTERLY REPORT

**January - March 1996**

The **Quarterly** Report provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

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## EXIT EXAMINATIONS

On April 11, 1996, the Indiana State Board of Education established the grade level and initial administration for Indiana's "graduation" or "exit" examination.<sup>1</sup> The initial exit examination is required to be administered to the class of students expected to graduate at the conclusion of the 1999-2000 school year (current eighth grade students). The exit exam cannot be administered prior to the end of the students' ninth grade year. The initial exit examination is scheduled to be administered in the fall of 1997 (the 10th grade). The following is the current statutory requirements under I.C. 20-10.1-16-13.

### **20-10.1-16-13 Requirements for graduating students; graduation examination**

Sec. 13. (a) Beginning with the class of students who expect to graduate during the 1999-2000 school year, each student is required to meet:

(1) the educational proficiency standard tested in the graduation examination; and

(2) any additional requirements established by the governing body;

to be eligible to graduate.

(b) A student who does not meet the educational proficiency standard tested in the graduation examination shall be given the opportunity to be tested during each semester of each grade following the grade in which the student is initially tested until the student achieves a passing score.

(c) The board shall develop and adopt a procedure to enable students who:

(1) undergo the graduation examination; and

(2) do not receive a passing score on the graduation examination;

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<sup>1</sup>Under previous law, now repealed, this examination was referred to as the "Gateway Assessment Program." There is no official name for the current exit examination. I.C. 20-10.1-4.3, repealed by P.L. 340-1995, Sec. 106.

to appeal their particular results. The rules adopted by the board must provide for the specific eligible bases for which an appeal may be made and must include as one (1) basis for which an appeal may be made the submission by the appellant student of written evidence indicating that the student's teacher in areas tested by the graduation examination and principal, in their professional judgment, believe that the student's graduation examination results do not accurately reflect the student's attainment of the educational proficiency standard.

(d) A student who does not meet the educational proficiency standard tested in the graduation examination may:

(1) have the educational proficiency standard requirement waived; and

(2) be eligible to graduate;

if the principal of the school the student attends certifies that the student will within one (1) month of the student's scheduled graduation date successfully complete all components of the Core 40 curriculum as established by the board under I.C. 20-10.1-5.7-1.

(e) The state board of education shall determine the appropriate grade during which a student may initially undergo the graduation examination. The grade established under this subsection must be higher than grade 9.

Exit examinations, because of the perceived sanction of denying a high school diploma, invite more judicial scrutiny and adherence to procedural safeguards than other academic examinations.

The seminal case in this area is Debra P. v. Turlington, 474 F.Supp. 244 (M.D. Fla. 1979), aff'd in part, rev'd in part, 644 F.2d 397 (5th Cir. 1981); on remand, 564 F.Supp. 177 (M.D. Fla. 1983), aff'd, 730 F.2d 1405 (11th Cir. 1984). The Debra P. plaintiffs were African-American students whose schools had not implemented the necessary curriculum or provided their students opportunities to learn the subject matter which Florida's exit exam intended to assess as a prerequisite to receipt of a high school diploma. The plaintiffs' schools had been largely black schools, were poor, and were vestiges of past segregated public education. In essence, because plaintiffs had not had the opportunity to obtain the necessary curricular objectives, administration of the exit exam would result in a present discriminatory effect based upon a past discriminatory act (segregation).

A phase-in period for the test would be necessary in order to provide all students equal access to the same curriculum opportunities (in this case, the court recommended four years). The lengthy litigation history of this dispute did result in two significant findings:

1. The use of a competency test as a prerequisite to the granting of a diploma established objective standards and created a “climate of order” to motivate students.
2. The pass rate for minority students improved significantly during the six years of litigation, attesting to the effect of remediation on vestiges of past segregation through the proper use of the competency test.

Within the 7th Circuit Court of Appeals (which includes Indiana), the primary case is Brookhart v. Illinois State Board of Education, 697 F.2d 179 (7th Cir. 1983). In Brookhart, a school district instituted a requirement that all students pass a Minimum Competency Test (MCT) prior to receiving a diploma. Fourteen students with various disabilities challenged, through the hearing process, the MCT requirement. The Illinois State Board determined that the MCT was facially valid so long as reasonable modification were employed in order to minimize the effect of an individual student’s disabling condition. The State Board also found that the school district failed to provide adequate preparation and timely notice to the students that the MCT would be a prerequisite to receipt of a diploma. The 7th Circuit upheld the State Board, noting that a student with a disability who is unable to disclose the degree of learning he actually possesses because of the test format or environment would be the object of discrimination solely on the basis of disability. (In this case, the school district refused to modify the MCT for any student; hence, a blind student would be required to take the MCT as it was and not modified by large print or braille or given orally.) The court also agreed that before additional requirements for a diploma are instituted, adequate and timely notice for preparation is necessary. (It would be fundamentally unfair without adequate notice. In this case, some of the affected students were never exposed to as much as 90 percent of the material in the MCT without a showing that the students were incapable of learning the material.)<sup>2</sup>

Other recent decisions regarding students with special circumstances are:

1. Texas Education Agency (TEA), 23 IDELR 566 (OCR 1995). The Office for Civil Rights (OCR) found that the TEA’s refusal to modify its statewide assessment for students with disabilities but who do not require special education violated Sec. 504 of the Rehabilitation Act of 1973. TEA agreed to provide modifications where necessary, and agreed also that TEA bears burden of proof--not the student--where it is asserted modifications would affect the validity of test. See also Texas Education Agency, 16 EHLR 750 (OCR 1990) where OCR upheld TEA’s modifications, accommodations, remediation and retesting efforts on behalf of students in special education.

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<sup>2</sup>For Indiana’s modification/accommodations requirements, see 511 IAC 7-6-8 (special education) and 511 IAC 5-2-4(b) for all other students with disabilities.

2. Ohio Department of Education, #15-94-5003 (OCR 1994). This compliance review/investigation by OCR centered on Ohio's Ninth Grade Proficiency Test, one of several grade-level proficiency tests Ohio utilizes. However, it is passing the Ninth Grade test which is a precondition to receipt of a high school diploma. OCR and Ohio DOE achieved a resolution of the complaint where Ohio agreed to pay special attention to certain target groups, in this case, African-American students and students with Limited English Proficiency (or LEP). Part of these efforts include maintaining remediation programs and stricter enforcement of attendance policies. (School attendance was a major factor for many of the students who did not pass the Ninth Grade Proficiency Test.) Students with LEP would be provided meaningful opportunities to demonstrate competencies in learning outcomes. This investigation, which received wide attention in education-related periodicals, underscored two essentials for high stakes tests:
  - a) Remediation programs are necessary, especially those programs targeting identifiable populations not performing at expected or projected levels; and
  - b) Increased accountability of schools and students is necessary to ensure students are being provided curricular opportunities comparable to other schools (and that students actually attend school).
3. Rankins v. Louisiana State Board of Elementary and Secondary Education, 637 So.2d 548 (La. App. 1994), writ. den., 635 So.2d 250 (La. 1994), cert. den., 115 S. Ct. 195 (1995). This case supports the accepted legal fact that States can establish reasonable conditions for receipt of a high school diploma. This situation is a little different because Louisiana requires only public school students to pass its two-part exit exam in order to receive a diploma. Students in parochial or private schools, home schools, or who earn the GED do not have to take the exam. The court found that this does not deny Equal Protection to public school students. The important finding in this case is that an exit exam can be a requirement for graduation but it must be specifically tied to the curriculum taught in the schools.

From a review of judicial and administrative decisions regarding exit examinations, the following are generally accepted legal premises.

1. Exit examinations must be related to curriculum ("curriculum validity").
2. Students must have actual opportunities to be taught the curriculum.
3. There must be sufficient notice to parents and students prior to the administration of the exit examination as a precondition to receipt of a diploma.
4. There should be multiple opportunities to pass the exit examination.

5. There must be remediation programs available to target academic deficiencies of students who have failed the exit examination.
6. A state and its school districts must address issues related to poor performance, such as attendance and depressed schools.
7. The exit examination must be designed and administered so as to assess the degree of academic ability and not the degree of disability.
8. There should be a clear, positive, articulated policy for the implementation/administration of an exit examination and the application of its results.

### **“OPT-OUT” CURRICULUM AND RELIGIOUS BELIEFS**

David Grim v. Whitley Consolidated School Corporation, Cause No. 92D01-9309-CP-116 (Whit. Super. Ct., June 24, 1994), addressed a situation where the parents sought to have their son excused for religious reasons from AIDS awareness instruction required by I.C. 20-10.1-4-10. The parents believed that the “opt out” language at I.C. 20-10.1-4-7(b) should apply to the AIDS instruction. I.C. 20-10.1-4-7(b), which refers to “hygiene” instruction, reads as follows:

(b) Any person who objects in writing, or any person under the age of eighteen (18) whose parent or guardian objects in writing, to health and hygiene courses because the courses conflict with the person’s religious teachings is entitled to be excused from receiving medical instruction or instruction in hygiene or sanitary science, without penalties as to grades or graduation.

The school noted that the AIDS instruction statute is mandated, is a separate statute, and does not provide an “opt out” provision or refer to the “opt out” provision under the “hygiene” statute. The student did not attend the class and received a failing grade.

In sustaining the failing grade the student received, the court noted that at the time the “hygiene” statute was passed with its “opt-out” provision in 1975, AIDS as a medical syndrome was not known, and wouldn’t be until 1981. “When enacting the opt-out provision of I.C. 20-10.1-4-7, the Indiana Legislature was unaware that a communicable disease later would be identified that would present such a massive crisis as AIDS has.” The court noted that by 1988 “AIDS had become a national crisis” when Indiana’s Legislature enacted the AIDS statute mandating education in Indiana’s schools. The General Assembly was presumptively aware of its opt-out provisions, but neither included this in the AIDS statute nor referred to it. “This Court must presume that the Legislature intended to enact what it did enact: here it enacted a required AIDS curriculum requirement without an opt-out provision.” As a result, the school “acted lawfully by requiring [the student] to take the AIDS curriculum and issuing a failing grade when he did not do so.”

The Court added that it “recognizes and appreciates the [family’s] sincere religious beliefs. Those beliefs, however, do not exempt them from the realities of the AIDS crisis.

“AIDS is a real world problem, the impact of which [the student] and his classmates will have to face, regardless of their religious beliefs. Because no one is immune from the effects of the AIDS crisis, the Legislature apparently made no one exempt from learning about it.”

The parents and the student placed the school--and themselves--in an “either/or” situation. It does not appear from the court’s decision that any accommodation was sought whereby the “compelling State interest” in AIDS instruction could be achieved through means which would be less intrusive or restrictive of religious beliefs. This is the basic requirement of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb-1 to 2000bb-4, which forbids governmental entities from “substantially burden[ing] a person’s exercise of religion” except where such a “substantial burden” is “in furtherance of a compelling governmental interest; and...is the least restrictive means of furthering the compelling governmental interest.” §2000bb-1(a),(b).<sup>3</sup>

Although the Grim case was not brought under the RFRA, the RFRA has been applied retroactively. §2000bb-3(a). See Bessard v. California Community Colleges, 867 F.Supp. 1454, 1458-60 (E.D. Cal. 1994).

In striking a balance between a person’s free exercise and a “compelling State interest,” courts have looked to accommodations for fashioning remedies in disputes under the RFRA. One such accommodation may be “opt-out” provisions, substitution of a substantially similar curriculum, or exemption. This would be affected by the nature of the “compelling State interest,” the religious beliefs, and the availability of lesser restrictive or intrusive means for achieving the “compelling State interest.”

This arose in the recent ISTEP+ lawsuit, where the plaintiffs alleged violations of the RFRA by the inclusion of open-ended essay questions on Indiana’s statewide assessment. As the court noted:

Nowhere within their complaint do Plaintiffs allege any operative facts indicating that the use of open-ended questions on the ISTEP Plus places such a burden upon the practice of the religion that they are unable to practice their religious beliefs. Even if plaintiffs

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<sup>3</sup>A “substantial burden” has been defined by the U.S. Supreme Court as “[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.” Thomas v. Review Bd., Indiana Employ. Sec. Div., 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1432 (1981).

could state a claim, the most relief to which they would be entitled would be exemption of particular children from the ISTEP requirements. They certainly would not be entitled to shut down the state's entire assessment system based on the religious practices of one child.

Taxpayers Involved in Education, Inc., et al. v. Indiana Department of Education et al., Cause No. 49D03-9509-CP-1357 (Marion County Sup. Ct. 1995), at 29.

It is likely that even under the RFRA the plaintiffs in the Grim dispute would not have prevailed. The court's reasoning regarding the AIDS crisis and the General Assembly's response to this crisis would seem to support that the mandatory educational scheme is a "compelling State interest" for which there could be no lesser restrictive or intrusive means. The following are two recent applications of the RFRA.

1. Brown v. H.S.&S. Productions, Inc., 68 F.3d 525 (1st Cir. 1995). This case involved compulsory attendance at a somewhat explicit AIDS awareness assembly. The parents alleged violation of the RFRA. The court disagreed, stating at 534: "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents...do not encompass a broad-based right to restrict the flow of information in the public schools."
2. Cheema v. Thompson, 67 F.3d 883 (9th cir. 1995). Plaintiffs are school-aged children who are members of the Khalsa Sikh sect. A central tenet of their religion requires them to wear at all times five symbols of their faith. One of these symbols is the "kirpan," a curved ceremonial knife about 6-7 inches long and kept in a sheath. The school refused to allow the children to wear the kirpans to school. School policy bans all weapons, including knives, from school grounds. The children claimed the ban violated the Religious Freedom Restoration Act. To prevail, the children would have to show (1) that wearing kirpans was motivated by a sincere religious belief and (2) the school district's refusal to accommodate the belief put a substantial burden on the exercise of their religion. The school could not demonstrate a less restrictive alternative, particularly as other California school districts with Khalsa Sikh students had accommodated such students by agreeing the kirpan would be no more than two and one-half inches long, dulled and securely fastened in a sheath. The school had an obligation to accommodate.

## **GRADES**

Although most cases involving disputes over grades usually involve sanctions for disciplinary or attendance reasons, there have been a number of recent cases where court action was sought because of fundamental differences regarding the grades awarded as a sanction in and of themselves. The following are of interest.



### *Hearing Rights*

1. In Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990), a University of Texas student challenged the “D” grade he received in physics. The student filed his suit under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g and 34 CFR Part 99. The court dismissed because FERPA hearings are not for challenges to grades awarded by teachers but are available to challenge “ministerial errors” (inaccurate or misleading education record entries). “Students’ grades, as reflected in educational records, can only be inaccurate or misleading if they do not reflect what the grader intended or if they are mathematically incorrect.” At 891. For a recent application of Tarka, see Lewin v. Medical College of Hampton Roads, 910 F.Supp.1161, 1170 (E.D. Va. 1996) where a discharged medical student challenged the scoring of an examination.

Also see Honig v. Florida Commission on Human Relations, 659 So.2d 1236 (Fla. App. 1995) dismissing a student’s lawsuit challenging the “B” she received in German I.

### *Class Rank/Valedictorian*

2. In Townsend v. Board of Education of Robeson County, 454 S.E.2d 817 (N.C. App. 1995), the student sued the school board for negligent infliction of emotional distress when a recalculation of grades revealed she was not first in her class but fourth, thus preventing her from being valedictorian. The court rejected her civil rights claim because she “did not obtain the right to be valedictorian” (at 819). The miscalculation occurred near the end of plaintiff’s junior year when, because of computer system irregularities, the principal used a weighted grade average formula which did not follow school board policy. A new principal assumed responsibilities the following school year, noticed the error, recalculated the grades according to school board policy (five times), and advised all affected students and parents of the error. The school board upheld the principal. The plaintiff admitted that the calculations were not incorrect nor was she ever told she would be chosen as valedictorian. “The mere fact that plaintiff believed that she was going to be first in her class does not demonstrate negligence on the part of defendants simply because plaintiff failed to reach that goal.” Id. The court also rejected plaintiff’s conspiracy allegation.

### *Free Speech*

3. In Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995), a 9th grade student in Tennessee brought suit challenging a grade of zero for her paper, “The Life of Jesus Christ.” The teacher’s goal was for her students to learn elementary research skills. To that end, students could select a topic, subject to her approval, which would be “interesting, researchable, and decent.” At 153. The student chose “drama” and later, without approval of the teacher, attempted to submit an outline for a paper entitled “The Life of Jesus Christ.” The teacher refused the outline, which was followed by discussions with plaintiff’s father and school officials. The teacher said she would accept a paper on religion “as long as it did not deal solely with Christianity or the Life of Christ.” The

student, nonetheless, attempted to submit an outline entitled “A Scientific and Historical Approach to Jesus Christ.” The teacher refused the outline. For failure to comply with the project requirements, the student received a zero. Suit followed, alleging the student’s rights of free speech were violated. The teacher articulated six reasons for refusing the student’s topic. Although some of her reasons were inexact understandings of the law and theological research, this would be understandable given the current sensitivity toward the Establishment Clause. The district court found for the teacher and school board. The circuit court upheld the decision that the student’s First Amendment rights of free speech were not violated. “The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question” (at 159). The court also noted at 155-56:

Like judges, teachers should not punish or reward people on the basis of inadmissible factors--race, religion, gender, political ideology--but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher’s responsibility in the classroom to draw lines and make distinctions--in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech.

One judge concurred in the result but rejected the premise the majority employed to reach its conclusion. He stated simply that “the bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it.” (Batchelder, Circuit Judge, Concurring, at 158).

4. Pennsylvania earlier had a somewhat similar case. In Duran v. Nitsche, 780 F.Supp. 1048 (E.D. Pa. 1991), appeal dismissed, 972 F.2d 1331 (3rd Cir. 1992), fifth grade students in an “Academically Talented Program” (ATP) were given an independent study assignment which required them to research a topic related to “The Power of \_\_\_\_.” The plaintiff-student chose “The Power of God,” which was approved by the teacher. Students were required to report on the progress of their research and had weekly timelines for the completion of various research tasks. Students could also use, as one of their sources, a survey of other students’ views on their particular topic. The plaintiff never brought necessary research materials to class and never met any of the aforementioned timelines.

Plaintiff did develop a survey, which the teacher reviewed with her but did not approve for distribution until more work was done. Plaintiff photocopied the survey and distributed it anyhow. When it was time for students to present oral reports on their topics, the teacher, noting the plaintiff had not complied with class work task prerequisites, would not let her make her report to the class. Later, the plaintiff gave her oral report to the teacher in the library. The report consisted only of the survey results. The parents claimed the student's free speech rights were violated, and the lawsuit followed.

The court rejected the parents' and plaintiff's claims, noting that the classroom restrictions, especially considering the plaintiff's age, were "reasonably related to legitimate pedagogical concerns." Under such circumstances, "restrictions are, in fact, constitutionally permissible" (at 1054). "[T]his court agrees that evaluations of the particular capabilities of fifth grade students, in the context of curriculum related activity, is best left to those who are most familiar with the students' educational aptitude." At 1056.

### **PAROCHIAL SCHOOL STUDENTS WITH DISABILITIES: REDUX**

The 7th Circuit Court of Appeals on April 12, 1996, reversed the district court's decision in K.R. by M.R. v. Anderson Community School Corporation (see **QR** July-Sep't: 95). The district court had ordered the school district to provide an instructional assistant for K.R. in her parochial school as a means of providing "comparable services" to private school children under the provisions of 34 CFR Part 76 (EDGAR) rather than under 34 CFR Part 300 (Individuals with Disabilities Education Act or IDEA). K.R. ex rel. M.R. v. Anderson Comm. Sch. Corp., \_\_\_F.3d\_\_\_ (7th Cir. 1996).

The 7th Circuit relied upon the language in IDEA, which addresses unilateral placements of children with disabilities, as well as interpretations by the U.S. Department of Education regarding the application of the IDEA regulations. The court noted that EDGAR is cross-referenced by IDEA at 34 CFR §300.451(b), but declined to elevate EDGAR's "genuine opportunity for equitable participation" or "comparable" benefits language for private school students to mean nearly identical services. 34 CFR §§76.651(a)(1),(2); 76.652(a); 76.653; 76.654(a). The district court's "conclusion [that EDGAR requires nearly identical services] contradicts the conventional understanding of the IDEA, including the DOE's understanding" (at pp. 6, 10). The district court's expansive treatment of unilaterally placed children in private schools was, likewise, contrary to Congressional intent (at pp. 6-8).

The 7th Circuit's decision restores the decision of the Independent Hearing Officer and the Indiana Board of Special Education Appeals that school districts have discretion in determining how private school children with disabilities will have a genuine opportunity for participation, as contemplated by 511 IAC 7-4-4.

Although the 7th Circuit Court of Appeals has reversed the district court's opinion at 887 F.Supp. 1217 (S.D. Ind. 1995), the district court's K.R. opinion has spawned a number of similar

findings by other district courts in other circuits. The most recent K.R. type decision is Fowler v. Unified Sch. Dist. No. 259, 900 F.Supp. 1540 (D. KS. 1995), which required the school district to provide one-on-one interpretive services at a private, nonsectarian school for a deaf, gifted student. The 7th Circuit has now joined the 4th Circuit in rejecting an expansive application of “comparable services.”

## **LOYALTY OATHS**

In Indiana, each person who applies for a teacher license or a license renewal to teach in a public school is required under I.C. 20-6.1-3-4(a) to subscribe to a “loyalty oath,” which may be administered by the school corporation’s governing body. The “loyalty oath” reads as follows:

“I solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of Indiana.”

The same oath appears on the teacher license application form provided by the Indiana Professional Standard Board.

There is a related statute under Mandatory Curriculum entitled “Morals Instruction,” I.C. 20-10.1-4-4, which reads in relevant part:

Morals Instruction. Each public and non-public school teacher, employed to instruct in the regular courses of the first twelve (12) grades, shall present his instruction with special emphasis on honesty, morality, courtesy, obedience to law, respect for the national flag, the constitutions of the United States and of Indiana, respect for parents and the home, the dignity and necessity of honest labor and other lessons of a steadying influence, which tend to promote and develop an upright and desirable citizenry.

Many “loyalty oaths” have their genesis in the late 1920s and early 1930s when a number of states passed subversive activities acts aimed at preventing the spread of communism. A number of “loyalty oaths” were struck down by the courts because of vagueness and infringement upon First and Fourteenth Amendment rights, particularly free speech and due process rights. There had not been a “loyalty oath” case involving teachers for some time until recently, when New Jersey addressed the question again, and determined a loyalty oath similar to Indiana’s passes constitutional muster.

Gough v. New Jersey, 667 A.2d 1057 (N.J. Super. A.D. 1995), provides a comprehensive review of the case history of “loyalty oaths,” especially those involving teachers. Gough applied for a substitute teaching position but was denied the position because he would not sign New Jersey’s loyalty oath without qualifying the language. The New Jersey “oath of allegiance” has been amended over the years but dates from September 19, 1776, when an affiant had to “profess and swear (or, if one of the People called Quakers, affirm) That I do and will bear true Faith and

Allegiance to the Government established in this State under the Authority of the People. So help me God.”<sup>4</sup>

The New Jersey court noted the U.S. Supreme Court’s “vagueness test” and the concomitant concerns regarding the “chilling effect” on speech when loyalty oaths are required. Government may not condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments, especially as these relate to political beliefs. Government may not condition employment on an oath that one has not engaged, or will not engage, in protected speech activities such as criticizing institutions of government, discussing political doctrine that approves the overthrow of certain forms of government, and supporting candidates for political office.

Employment cannot be conditioned on an oath denying past or abjuring future associational activities within constitutional protection, nor may an oath be so vague that “men of common intelligence must necessarily guess at its meaning and differ as to its application [because such an oath] violates the first essential of due process of law.” At 1063-64, relying upon Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 82 S.Ct. 275, 281 (1961). The “vagueness test” is better explained in Baggett v. Bullitt, 377 U.S. 360, 379-80, 84 S.Ct. 1316, 1327 (1964): “[W]e do not question the power of the State to take proper measures safeguarding the public service from disloyal conduct. But measures which purport to define disloyalty must allow public servants to know what is or is not disloyal.”

The New Jersey court distinguished oaths between “loyalty” oaths which are constitutionally infirmed (see Baggett below) and “support oaths” which are not. A “support oath,” which Indiana’s would be considered, is a “plain, straight-forward and unequivocal...recognition that ours is a government of laws and not of men.... [This does not curtail expression by acknowledging one’s responsibility to support the U.S. and State constitutions.] Recognition of and respect for law in no way prevents the right to dissent and question repugnant laws. Nor does it limit the right to seek through lawful means the repeal or amendment of state or federal laws with which the oath taker is in disagreement.” At 1068, relying upon Hosack v. Smiley, 276 F.Supp. 876 (D. Colo. 1967), affirmed 390 U.S. 744, 88 S.Ct. 1442 (1968) upholding a Colorado teacher’s oath similar to Indiana’s oath. The New Jersey court added at 1069: “The very constitutions and governments to which he swears allegiance under the authority of the people are bound by positive law to respect and preserve the personal and political liberties which appellant fears are impugned by the oath.”

Gough’s “right to speak and dissent is fully protected by law” and is not diminished by the New Jersey teacher’s oath, the court noted at 1070. “The oath simply declares allegiance to the State and Federal governments which are compelled by their fundamental documents to assure [Gough’s] expressional rights.”

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<sup>4</sup>The current New Jersey “loyalty oath” includes “So help me God” but does not require an affiant to make the declaration.

1. Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316 (1964). This is the case upon which Gough relied in his unsuccessful challenge to New Jersey's loyalty oath. The "loyalty oath" challenged in Baggett was created in 1931 in Washington. The oath contained the "support oath" language but also had more generally stated "loyalty" language such that the oath was a combination of Indiana's loyalty oath and morals instruction language. The oath, which was found unconstitutional, read as follows:

I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.

The U.S. Supreme Court found that Washington's oath offended due process because of vagueness, especially the exactment of a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the Federal and State governments.

"The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise. Cf. West. Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 [Jehovah's Witnesses' refusal for religious reasons to pledge allegiance to the flag]. Even criticism of the design or color scheme of the State flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath. And what are the "institutions" for the purposes of this oath?...The oath may prevent a professor from criticizing his State judicial system or the Supreme Court or the institution of judicial review....

377 U.S. at 371, 84 S.Ct. at 1322.

The court added that the oath provides an "ascertainable standard of conduct" such that the oath inhibits the exercise of individual freedoms affirmatively protected by the constitution.

See also Mackay v. Rafferty, 321 F. Supp. 1177 (N.D. Cal.), affirmed, 400 U.S. 954, 91 S.Ct. 355 (1970) declaring unconstitutional a California teacher's oath which was similar to Washington's oath in Baggett.

2. Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S.Ct. 656 (1974). Indiana passed a statute which, as a condition for access to the ballot, required a political party to file with the State Election Board an affidavit, under oath, "that it does not advocate the

overthrow of local, state or national government by force or violence...” The Indiana Communist Party refused to sign the original affidavit and was refused a place on the 1972 ballot. Following a declaratory action in the federal district court, the Communist Party filed the affidavit but sought to qualify the oath by defining “advocate” to distinguish between protected constitutional activity (free speech, freedom of association) as opposed to unprotected activity (imminent lawlessness, illegal activity). The Election Board again rejected the oath and denied inclusion on the 1972 ballot. The U.S. Supreme Court found Indiana’s “loyalty oath” unconstitutional because it infringed upon constitutional guarantees. Advocacy of unpopular views that may involve use of force or law violation (an abstract doctrine) is different from advocacy which is directed to inciting or producing imminent lawless action or is likely to incite or produce such action. An interesting note is made in the concurring opinion of four Supreme Court justices. They would have found Indiana’s “loyalty oath” for political parties unconstitutional for an additional reason: equal protection under the Fourteenth Amendment. The concurring opinion observed that the Indiana State Election Board required certain political parties to sign the “loyalty oath” but did not require the Democrat or Republican Parties to do so. 414 U.S. at 451-52.

3. Bessard v. California Comm. Colleges, 867 F.Supp. 1454 (E.D. Cal. 1994). As a precondition for employment, applicants were required to take a “loyalty oath” which was nearly identical to the oath found unconstitutional for teachers in the MacKay case above. The plaintiffs were Jehovah’s Witnesses whose religious beliefs prohibit the taking of such oaths. The action was brought primarily under the Religious Freedom Restoration Act (RFRA). The court found that requiring an applicant to take the “loyalty oath” where it would “substantially burden” the applicant’s religious belief and practice violates the RFRA. A “substantial burden” is not “mere inconvenience” but must put “substantial pressure on an adherent to modify his beliefs...” At 1462, citing Thomas v. Review Bd. of Ind. Employ. Sec. Div., 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1432 (1981). The State could not demonstrate a “compelling State interest” requiring the taking of the oath because oath-taking does not ensure loyalty. In addition, even if employee loyalty is a “compelling State interest,” the requiring of an oath which “substantially burdens” one’s religious beliefs is not the “least restrictive means” for realizing the State interest (at 1464). The State was enjoined from requiring the Plaintiffs to take the oath.

## COMPUTERS

“Why does this magnificent applied science which saves work and makes life easier bring us so little happiness? The simple answer runs: Because we have not yet learned to make sensible use of it.” Albert Einstein, address at California Institute of Technology (Feb. 1931). We may not have learned to make sensible use of it, but we are making lawsuits out of it.

*Statewide Computer Information Network*

In Princeton City Sch. Dist. Bd. of Education v. Ohio State Board of Education, 645 N.E.2d 773 (Ohio App. 1994), the school district sued the State Board challenging the creation and function of the Educational Management Information System (EMIS). The EMIS, which is administered by the Ohio Department of Education, was by created the General Assembly as a statewide computer information network of Ohio's public schools. The trial court did invalidate the portion of the statute which required school officials to collect the social security numbers of staff members but otherwise affirmed the validity of the statute, the State Board's rule implementing the EMIS statute, and the guidelines developed by ODOE to administer EMIS. The trial court rejected the school district's argument that the General Assembly improperly delegated legislative authority and that EMIS would violate the Family Educational Rights and Privacy Act (FERPA), 34 CFR Part 99. The court of appeals affirmed but for different reasons.

The Ohio General Assembly directed its State Board to collect information on student participation, performance, classroom enrollment, and demographics. This information was to be reduced to a report for public distribution. The State Board was authorized to promulgate rules for the operation of EMIS and develop guidelines. The court found that the General Assembly statute was clear in its directive to the State Board, and the State Board's rule "tracked the statute" and was, consequently, "constitutionally sound." The guidelines "are a kind of instruction manual showing methods and alternatives to identify, compile, collect and report the data." At 777. In order to show that guidelines are actually rules, the school districts "would have to show that they would be penalized for noncompliance." *Id.* Because the guidelines did not contain penalties or enforcement mechanisms, they were not considered "rules" and were thus exempt from the promulgation process. *Id.*

The appellate court also rejected the school district's "preemption" argument that the Ohio law violated the privacy provisions of FERPA. The court noted that FERPA has not so "pervasively occupied the field of regulation that it has left no room for State law" nor is there a conflict of laws such that the doctrine of preemption of State law would apply. *Id.* The court noted that EMIS expressly prohibits the reporting of personally identifiable information related to any student (at 778). FERPA, however, does include exemptions to nondisclosure without written parental consent, one exemption including the release of the contents of educational records to certain education officials conducting studies for "improving instruction." The court concluded that FERPA and EMIS do not conflict. (A concurring opinion takes exception to the majority's defining of "guidelines" as distinct from rules.)

### *E-Mail*

1. In Jenkins v. Missouri, 73 F.3d 201 (8th Cir. 1996), a continuing desegregation lawsuit (see **QR** Apr.-June: 95, "Desegregation and Unitary Status"), the Desegregation Monitoring Committee (DMC) proposed a program in which students in suburban districts would communicate by e-mail and facsimile transmission with students in the Kansas City, Missouri School District (KCMSD), the district under court supervision. The "ShareNet" program was a part of a voluntary interdistrict transfer plan. The DMC is an "arm of the court" and not a party or intervenor in the continuing dispute. The district court approved the ShareNet program, but the plaintiff class ("Jenkins"), the State, and



the school district appealed. The 8th Circuit reversed, finding that the Share-Net plan lay outside the limited area available to the district court in crafting a desegregation remedy. See Jenkins v. Missouri, 38 F.3d 960, 965 (8th Cir. 1994). Although the plaintiffs and the State joined in successfully opposing the ShareNet plan, the district court ordered the State to pay the plaintiffs' attorney fees incurred in opposing the DMC's proposal. The 8th Circuit affirmed the award of fees against the State because the ShareNet program was part of continuing efforts to eradicate segregation the State was legally responsible in the first place for creating and maintaining.

2. Armstrong v. Executive Office of the President, 810 F.Supp. 335 (D. D.C. 1993), is a long-running dispute between private researchers and several federal agencies, including the White House, over the preservation of certain computer-generated files or records, including e-mail. The suit began in 1989 as President Ronald Reagan was leaving office. At issue was whether computer files, including e-mail, were subject to the Federal Records Act (FRA), which would require review by the U.S. Archivist and adherence to the National Archives and Records Administration (NARA) rules. The court found that paper or "hard" copies of such files, including e-mail, do not contain all the information in the electronic version. "Such information can be of tremendous historical value in demonstrating what agency personnel [sic] were involved in making a particular policy decision and what officials knew, and when they knew it." At 341. Paper copies do not satisfy the FRA, the court held. Before any record under the FRA is destroyed or altered, the U.S. Archivist is responsible for review and disposition, including backup tapes. "Congress intended, expected, and positively desired private researchers and private parties whose rights may have been affected by government actions to have access to the documentary history of federal government." *Id.*, citing American Friends Service Comm'n v. Webster, 720 F.2d 29, 57 (D.C. Cir. 1983). The court noted that there are records in the Executive Office exempt from such review by the U.S. Archivist and disclosure under the FRA. Federal records are distinguished from presidential records created for the "sole responsibility...to advise the President." At 349. These records are subject to the Presidential Records Act (PRA), and are not subject to judicial review.

For additional commentary, see Elsa F. Kramer, "The Ethics of E-mail: Litigation Takes On One of the Challenges of Cyberspace," Res Gestae (Jan. 1996), pp. 24-27.

## **COURT JESTERS**

It is said of federal judges that "man promotes, but only God demotes." Because of the protected status of federal judges, it is popularly thought that these arbiters of federal law are not vexed by vagaries of vacuous vagrants. (That is, have to put up with silly, frivolous people.) This is, of course, not so. In Kent © Norman v. Ronald Reagan, 95 F.R.D. 476 (D. Oregon 1982), the court had to deal not once but twice with a guy who claimed the government had caused his "civil death." The court noted in a footnote that the "plaintiff's name apparently includes the copyright sign." At one time the plaintiff had been a truck driver for a company called "White Line Fevers From Mars" which, according to the court, "is not, despite its name, of genuine extraterrestrial

origin, but is apparently a fruit company which shipped marijuana and cocaine in ‘fruit boxes’ for Mother’s Day.” Id. Plaintiff lost his license and amassed a considerable number of parking tickets, for which he wishes to have a jury trial in federal court. The “complaint” filed in court, which appears at 477, appears to be blank verse descriptions of various birds, insects and other animals. The court dismissed the complaint as frivolous, but the Ninth Circuit remanded. The

judge, obviously miffed by the remand, tersely recounted what facts he had, including the “complaint,” which reads as follows:

The birds today  
Are singing loudly,  
The day is fresh  
With the sounds  
Upon the wind  
The crickets,  
The blackbirds  
The woodpeckers  
Beauty is every  
Spark of life  
Just So their sounds  
Are appreciated  
Their sounds are beauty  
The ants are silent  
But always searching  
The birds noise a song  
and the fade of the automobile tires  
Chirp. A shadow from  
a passing monarch butterfly  
Breathless in Colorado

Kent © Norman  
1981

The judge dismissed again for want of prosecution. It was not remanded a second time. If there is any lesson here, it would appear that one shouldn't sample so freely gifts intended for Mother's Day.

### QUOTABLE...

“Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of

dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

“It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

...

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Justice Robert H. Jackson, Majority Opinion, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640-42 (1943), enjoining State regulation which expelled students from school for refusing on religious grounds to salute the flag or pledge allegiance to the flag.

### UPDATES

1. Community Service. The citation for the circuit court of appeals decision upholding the district court’s determination that the school district’s community service program was a legitimate educational function is Immediato v. Rye Neck School District, 73 F.3d 454 (2nd Cir. 1996). See **QR** Oct.-Dec.: 95.
2. Parochial School Students with Disabilities. Although K.R. v. Anderson Comm. Schools has been reversed by the 7th Cir., *infra*, there are other courts relying upon the now-reversed Indiana district court’s decision. Two more recent decisions are:
  - \* Cefalu v. East Baton Rouge Parish School, 907 F.Supp. 966 (M.D. La. 1995), which was referenced in **QR** July-Sep’t: 95. This is an updated citation.
  - \* Russman v. Bd. of Ed. of the Enlarged Sch. Dist. of the City of Watervliet, 22 IDELR 1028 (N.D. N.Y. 1995) (School district had to provide teacher consultant and teacher aide for 11-year-old student with mental retardation at her parochial school).
3. Attorney Fees and Special Education. The Indiana Department of Education has filed a brief *amicus curiae* in Madison Area Educational Sp. Serv. Unit and Southwestern Consol. Sch. Corp. v. Daniels on appeal from the Jefferson County Superior Court to the Indiana Court of Appeals. IDOE is supporting the school district’s claim the trial court judge applied the wrong statute of limitations to a request for attorney fees arising out of an IDEA special education due process hearing. The court applied the two-year statute of limitations for personal injury. This is in conflict with the decision of the 7th Circuit Court of appeals, which applied the thirty-day statute of limitations to IDEA-related attorney fee requests as being the “most analogous” limitations period to achieve the

IDEA's intention to resolve quickly special education disputes. See Powers v. Ind. Dep't of Ed., 61 F.3d 552 (7th Cir. 1995), **QR** Jan.-Mar.: 95 and **QR** July-Sep't: 95.

Date: \_\_\_\_\_

\_\_\_\_\_  
Kevin C. McDowell, General Counsel